TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 186

THE PEOPLE OF SIOUX COUNTY, NEBRASKA, PETITIONER,

vs.

NATIONAL SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED [illegible]

CERTIORARI GRANTED [illegible]

(28,440)

(32,548)

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN DISTRICT COURT OF SIOUX COUNTY, NEBRASKA

EDWIN B. LYON, as Treasurer of the County of Sioux, Plaintiff,

vs.

NATIONAL SURETY COMPANY, Defendant

PETITION

Comes now the plaintiff Edwin B. Lyon, as treasurer of the county of Sioux in the state of Nebraska, by M. J. O'Connell, Esq., and Messrs. E. D. & F. A. Crites, his attorneys, and complaining of the defendant National Surety Company avers and respectfully shows to the court:

1. The County of Sioux on all of the dates hereinafter alleged was, ever since has been, and now is, a body politic and corporate, duly authorized, organized and existing as one of the counties of the state of Nebraska under the constitution and laws of the state of Nebraska.

2. This plaintiff now is and on all of the dates hereinafter alleged was the duly elected, qualified and acting [fol. 2] County Treasurer of said county of Sioux, for the term of four years commencing on the 4th day of January, A. D. 1923 and that this plaintiff is now in the possession of said office and in the exercise of the powers, rights, duties and franchises thereof.

3. That the defendant, National Surety Company, on all of the dates hereinafter alleged was, and now is, a corporation duly authorized, organized and existing as such under and by virtue of the laws of the state of New York, doing a general surety business with its principal office and place of business in the city of New York, in the state of New York, under the corporate name and style aforesaid, and that said National Surety Company on said dates was duly admitted, licensed and let in to do and in the actual transac-

tion of a general surety business in the county of Sioux, in the state of Nebraska.

4. That on all of said dates the First National Bank of Harrison was, and now is, a national banking corporation duly authorized, organized and existing as such under the national banking laws of the United States with its principal office and place of business at Harrison in Sioux county, Nebraska, and until becoming insolvent, as hereinafter alleged, transacted a national banking business at Harrison, in the county of Sioux, under the corporate name and style aforesaid.

5. That under and by virtue of the provisions of law in that behalf it is the duty of this plaintiff to deposit and at all times keep on deposit for safe keeping in state, national or private banks doing business in the county of Sioux, and of approved and responsible standing, the amount of moneys in his hands collected and held by him as such County Treasurer, and that pursuant to the provisions of law in that behalf the said, The First National Bank of Harrison, on the 26th day of December A. D. 1922, then being located in said county of Sioux, did apply in writing, to the Honorable The Board of County Commissioners of Sioux county, Nebraska for the privilege of keeping such moneys upon deposit in said bank upon the following conditions: All such deposits to be subject to payment when demanded by the County Treasurer on his check, and interest to be paid thereon amounting to 2% per annum upon the amount so deposited as provided by law and subject also to such regulations as are imposed by law, and for the security of the funds so deposited under the provisions of law this plaintiff did require the said, The First National Bank of Harrison as such depositary to give bond for the safe keep-
[fol. 3] ing and payment of such deposits and the accretions thereof, running to the People of the County to be approved by the County Board and conditioned that such depositary should, at the end of each and every month, render to the Treasurer and County Board a statement, in duplicate, showing the several daily balances and the amounts of moneys of the county held by it during the month, and the amount of the accretion thereof, and how credited, and for the payment of the deposits and the accretions accrued thereon as provided by law, and for the payment of the

deposits and the accretions thereon when demanded by the County Treasurer on his check at any time and generally to do and perform whatever might be required by the provisions of law and the faithful discharge of the trust reposed in such depositary.

6. That thereupon the said defendant, The National Surety Company, by its duly authorized agent and attorney in fact in consideration of a certain reward to it paid by the said, The First National Bank of Harrison, and in further consideration of the deposits of money to be made by this plaintiff in the said depositary bank, The First National Bank of Harrison in reliance upon such bond did, with the said First National Bank of Harrison as principal, duly make, execute and deliver to the plaintiff its depositary bond or obligation in writing running to The People of the County of Sioux, in the state of Nebraska, as obligee, conditioned as required by law, and as above recited and set forth, of which the following is a true and correct copy to-wit:

National Surety Company

County Depositary Bond

(Nebraska)

Know all men by these presents:

That we, First National Bank of Harrison, Nebraska as Principal, and the National Surety Co. of New York, N. Y., as Surety are held and firmly bound unto the people of the County of Sioux in the State of Nebraska, in the just and full sum of Thirty Thousand and no/100 Dollars ($30,000.00), for the payment of which, well and truly to be made, we hereby bind ourselves, our successors and assigns, jointly and severally by these presents, Dated this 12th day of December A. D. 1922.

[fol. 4]

Whereas, the said Bank in consideration of the deposits of certain of the moneys of Sioux County — for safe keeping with and in First National Bank, Harrison, Nebraska the amount whereof shall be subject to withdrawal or diminution by said

County Treasurer, as the requirements of said County Shall demand, and which amount may be increased or decreased as the said Treasurer may determine; and, Whereas, the said Bank, in consideration of said deposit, and for the privilege of keeping the same, has agreed to pay and will pay to Sioux County the sum of not less than two per cent (2%) per annum on account of said deposit, the same shall be paid quarterly upon the daily average of the sum of such amount as the said Bank shall have on deposit, for the quarter or any fraction thereof next preceding the payment of said percentum, which shall be computed and credited to the account of Sioux County And shall become a part thereof. Now Therefore, if the said First National Bank of Harrison, Nebraska shall at the end of every month render to the Treasurer of said Sioux County and County Board a statement in Duplicate showing the daily balance of the Sioux County moneys held by it during the month next preceding, and the accretions thereof, and has the same has been credited, and shall well and truly keep all said sums of money so deposited, or to be deposited, as aforesaid, subject to the check and order of County Treasurer, as aforesaid, and shall pay over the same and each and every part thereof, upon the written demand of the County Treasurer, and shall estimate, calculate and

[fol. 5] pay said percentum as aforesaid, and to his successor in office as shall be by him demanded, and shall in all respects, save and Keep the County of Sioux and the said County Treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void; otherwise to be and remain in full force and virtue. This bond to be and remain in full force for a period of Four Years beginning on the

31 4th day of January 1923, and ending on the 6th day of
32 January 1927.
33 In Testimony Whereof, the said First National Bank
34 of Harrison, Nebraska the Principal,
35 herein named, has caused this instrument to be signed in its name and behalf by its President or Vice-President, attested by
36 its Cashier, and its Corporate Seal to be hereto affixed and the said National Surety Co., of New York, N. Y. the
37 Surety herein named, has caused this instrument to be signed in its name and behalf by its Attorney-in-Fact
38 and attested by its common and corporate seal hereto affixed the day and year above written.

First National Bank, Harrison, by W. H. Davis, Vice-President. Attested: Theo Okerblade, Cashier. (Corporate Seal First National Bank of Harrison, Harrison, Nebr.) National Surety Company, New York, Incorporated 1897.

[fol. 6] STATE OF NEBRASKA,
Sioux County, ss:

Filed in the office of County Clerk this 26th day of Dec. 1922.

A. C. Davis, County Clerk.

Book C of Bonds, page 277.
Approved as to form and sufficiency & ordered filed.
W. B. Woodruff, Chairman Board Co. Commrs.
Henry Thomas.

7. And that thereupon the said bond was duly filed with the County Board of Commissioners of said county, together with the said application for approval.

8. Thereupon to-wit: On the 26th day of December A. D. 1922 the Honorable Board of the County Commissioners of said county of Sioux did duly act upon the application of the said, The First National Bank of Harrison, and did accept and approve the said application and did select said First National Bank of Harrison as such depositary and did accept and approve the said depositary bond so filed in behalf of said depositary bank and did give notice of

such acceptance and approval to the said defendant, the National Surety Company, and thereupon the said, The First National Bank of Harrison became, was, and so remained, until the insolvency of said bank, a depositary bank of county funds under the provisions of law in that behalf and that this plaintiff, as such County Treasurer, pursuant to law retained on deposit, and from time to time did deposit, and at all times did keep on deposit for safe keeping therein moneys in his hands collected and held by him as such County Treasurer in reliance upon the said bond above copied and set forth with the knowledge of the said defendant National Surety Company.

9. That the said depositary bond covered one term only of this plaintiff as County Treasurer to wit: The official term commencing on the 4th day of January A. D. 1923.

10. On the 4th day of February A. D. 1924 this plaintiff, as such County Treasurer, had and kept on deposit for safe keeping in said depositary bank to-wit: The said The First National Bank of Harrison, under and in reliance upon the said bond moneys in his hands so collected and held by him as such County Treasurer to and in the amount of $35,395.70, and that the same was so deposited and then [fol. 7] remained so on deposit in said depositary bank in an open account as a general deposit subject to the check or draft of this plaintiff as such County Treasurer and subject to disposition as provided by law and the condition of said bond, and that on said date the said, The First National Bank of Harrison, became and was insolvent and because of such insolvency ceased to do business as such, and closed its doors and refused to pay checks and drafts lawfully drawn thereon by this plaintiff, and its depositors, and the Comptroller of the Currency becoming satisfied of the insolvency thereof, after a due examination of its affiairs, having found the same to be insolvent, with the approval and consent of the Secretary of the Treasury of the United States, pursuant to the authority vested in him by law on the 12th day of February A. D. 1924 did appoint one Ralph S. Pryce, as receiver of the said insolvent bank. The First National Bank of Harrison, and that on the said 12th day of February A. D. 1924, the said Ralph S. Pryce, having duly qualified as such receiver, took possession of the said bank and all of the moneys, deposits, and

assets thereof including the deposit of this plaintiff therein for the purpose of closing the affairs of the said bank, and for the other purposes provided by law and ever since has been, and is now, the receiver of the said, The First National Bank of Harrison, and in possession of all of its moneys, deposits, properties and assets, and that the deposit above alleged and referred to and herein involved then had and held by this plaintiff in the said depositary bank was a deposit covered by the depositary bond above alleged, copied and set forth.

11. That by reason of said insolvency and the appointment of such receiver the said The First National Bank of Harrison incapacitated itself to make payment and delivery of the said moneys of this plaintiff as such County Treasurer so on deposit with it under said bond, but nevertheless this plaintiff has, from time to time, duly demanded payment of said deposit in said sum of $35,395.70 from the said bank and from its said receiver and has likewise, from time to time, prior to the institution of this suit, demanded the interest accruing under said deposit and secured by said bond, but payment thereof has been refused by the said bank and its said receiver for want of funds wherewith to pay and discharge the same and the same has been wholly converted to the use of the said, The First National Bank of Harrison, and no accounting has been made therefor to this plaintiff either by said bank or its said receiver.

12. The said bank paid interest under the terms of said deposit on the said deposit up to the first day of January [fol. 8] A. D. 1924, and that there is due under and unpaid from the said bank upon said deposit, interest at 2% per annum from that date on account of said deposit payable quarterly upon the daily average of the sum of such amount as the said bank had on deposit for the quarter or any fraction thereof next preceding the payment of said percentum, and that the amount of said interest so accruing upon daily balances from the first day of January A. D. 1924 to the date of the insolvency of said bank and the demand by this plaintiff of payment of his deposit and the refusal of the said bank to-wit: The 4th day of February 1924 in the sum of $ .... which should be tacked to the

principal sum, together with interest on the total at 7% per annum from the said 4th day of February A. D. 1924.

13. Plaintiff brings this action in his official capacity as treasurer of said County of Sioux for the use and benefit of the people of the county.

14. There is now justly due, owing and unpaid from the defendant National Surety Company under the terms of said bond in consideration of the premises the sum of $30,000.00, no part whereof has been paid, although payment has been often demanded.

15. Wherefore plaintiff prays judgment against said defendant in the sum of $30,000.00 its debt, together with 7% interest thereon from February 4, 1924 and costs of action.

M. J. O'Donnell, County Attorney, and E. D. & F. A. Crites, Attorneys for Plaintiff.

Duly sworn to by Edwin B. Lyon. Jurat omitted in printing.

[fols. 9 & 10] Præcipe for summons, filed October 7, 1924, omitted in printing.

Summons and sheriff's return, filed October 20, 1924, omitted in printing.

[fol. 11] In District Court of Sioux County

[Title omitted]

Petition for Removal to United States District Court—Filed November 7, 1924

To the Honorable W. H. Westover, Judge of the District Court of Sioux County, Nebraska:

Comes now the defendant, National Surety Company, and files this its petition for the removal of this case from the aforesaid District Court in which the same is now pending,

to the District Court of the United States in and for the District of Nebraska, Chadron Division, held in the city of Chadron in said district and state.

Your petitioner would show unto your honor:

1. That this cause was filed in this Court on the 7th day of October, 1924, and that the time to plead, answer or demur to the same has not expired under the laws of this state in such cases made and provided.

2. That this suit is civil in its nature, and one of which the District Courts of the United States have original jurisdiction, the same being an action by the plaintiff against the [fol. 12] defendant to recover from said defendant the sum of $30,000.00, together with interest and costs, upon a certain county depository bond, alleged to have been executed by the defendant.

3. That the matter in dispute exceeds the sum of Three Thousand Dollars, exclusive of interest and costs.

4. That at the time of the commencement of this suit, and since that time the plaintiff was and is now a resident of the state of Nebraska and the county of Sioux in said state, and that the defendant was at the time of the commencement of this suit, and since, and now is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, and is and was at the time of the commencement of this suit, and since, a resident of the State of New York, having its principal place of business in the city and county of New York, in said state.

Your petitioner herewith files a good and sufficient bond under the statute in such case made and provided, conditioned as the law directs and that he will within thirty days from the filing of this petition for removal file a certified copy of the record of the case in the District Court of the United States for the District of Nebraska, Chadron Division, and for the payment of all costs which may be awarded by said Court if the said District Court shall determine that this suit was improperly and wrongfully removed thereto.

Your petitioner therefore prays the court that it proceed no further herein except to order the removal, accept the

bond herewith presented, and direct a transcript of the record to be made and certified as provided by law.

Honnold & Clarke.

Duly sworn to by R. C. Clarke. Jurat omitted in printing.

[fol. 13] [File endorsement omitted.]

Bond on removal for $500.00, approved and filed November 7, 1924, omitted in printing.

[fol. 14] In District Court of Sioux County

Notice of Filing of Petition and Bond for Removal—Filed November 7, 1924

To M. J. O'Connell and E. D. & F. A. Crites, attorneys for plaintiff:

Notice is hereby given that the defendant in the above entitled cause, the National Surety Company, will on the 7th day of November, 1924, file in the District Court of Sioux County of Nebraska, in which said suit is now pending, its petition and bond for the removal of the said cause from said State Court to the District Court of the United States for the District of Nebraska, Chadron Division.

Honnold & Clarke, Attorneys for Defendant.

Copy of the foregoing notice, together with petition and bond for removal, received, and service thereof accepted this 7th day of November, 1924.

M. J. O'Connell & E. & F. Crites, Attorneys for Plff.

[File endorsement omitted.]

In District Court of Sioux County

Demurrer to Petition—Filed November 8, 1924

Comes now the above-named defendant, and demurs to the petition of the plaintiff heretofore filed for the reason

[fol. 15] that the same does not state facts sufficient to constitute a cause of action.

National Surety Company, Defendant, by Honnold & Clarke, Its Attorneys.

[File endorsement omitted.]

In District Court of Sioux County

[Title omitted]

Order of Removal—Filed November 10, 1924

Now on this 8th day of November, 1924, this cause came on to be heard at Chambers, in the city of Rushville, Nebraska, and the defendant having within the time provided by law filed its petition for removal of this cause to the District Court of the United States for the District of Nebraska, Chadron Division, and having at the same time filed its bond in the sum of five hundred ($500.00) Dollars with good and sufficient surety, conditioned as by law required, it is ordered that said bond be and the same hereby is accepted and approved, and that this cause be removed for trial to the District Court of the United States for the District of Nebraska, Chadron Division, and that all proceedings in said cause in this Court be stayed.

W. H. Westover, Judge of the District Court.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 16] In United States District Court, District of Nebraska

Edwin B. Lyon, as Treasurer of the County of Sioux, Plaintiff,

vs.

The National Surety Company, Defendant

Amended Petition—Filed January 16, 1925

Comes now the plaintiff Edwin B. Lyon, as treasurer of the county of Sioux, in the state of Nebraska, by M. J. O'Connell, Esq., and Messrs. E. D. & F. A. Crites, his attorneys, and complaining of the defendant National Surety Company avers and respectfully shows to the court:

1. The county of Sioux on all of the dates hereinafter alleged was, ever since has been, and now is, a body politic and corporate, duly authorized, organized and existing as one of the counties of the state of Nebraska under the constitution and laws of the state of Nebraska.

2. This plaintiff now is and on all of the dates hereinafter alleged was, the duly elected, qualified and acting County Treasurer of said county of Sioux, for the term of four years commencing on the 4th day of January A. D. 1923 and that this plaintiff is now in the possession of said office and in the exercise of the powers, rights, duties and franchises thereof.

[fol. 17] 3. That the said defendant, National Surety Company, on all of the dates hereinafter alleged was, and now is, a corporation duly authorized, organized and existing as such under and by virtue of the laws of the state of New York, doing a general surety business with its principal office and place of business in the city of New York, in the state of New York, under the corporate name and style aforesaid, and that said National Surety Company on said dates was duly admitted, licensed and let in to do *in* the actual transaction of a general surety business in the county of Sioux, in the state of Nebraska.

4. That on all of said dates the First National Bank of Harrison was, and now is, a national banking corporation

duly authorized, organized and existing as such under the national banking laws of the United States with its principal office and place of business at Harrison in Sioux County, Nebraska, and until becoming insolvent, as hereinafter alleged, transacted a national banking business at Harrison, in the county of Sioux, under the corporate name and style aforesaid.

5. That under and by virtue of the provisions of law in that behalf it is the duty of this plaintiff to deposit and at all times keep on deposit for safe keeping in state, national or private banks doing business in the county of Sioux, and of approved and responsible standing, the amount of moneys in his hands collected and held by him as such County Treasurer, and that pursuant to the provisions of law in that behalf, the said, The First National Bank of Harrison, on the 26th day of December, A. D., 1922, then being located in said county of Sioux, did apply in writing to the Honorable The Board of County Commissioners of Sioux County, Nebraska, for the privilege of keeping such moneys upon deposit in said bank upon the following conditions: All such deposits to be subject to payment when demanded by the County Treasurer on his check, and interest to be paid thereon amounting to 2% per annum upon the amount so deposited as provided by law and subject also to such regulations as are imposed by law, and for the security of the funds so deposited under the provisions of law this plaintiff did require the said, The First National Bank of Harrison as such depositary to give bond for the safe keeping and payment of such deposits and the accre- [fol. 18] tions thereof, running to the people of the County to be approved by the County Board and conditioned that such depositary should, at the end of each and every month render to the Treasurer and County Board a statement, in duplicate, showing the several daily balances and the amount of moneys of the county held by it during the month, and the amount of the accretion- thereof, and how credited, and for the payment of the deposits and the accretions accrued thereon as provided by law, and for the payment of the deposits and the accretions thereon when demanded by the County Treasurer on his check at any time and generally to do and perform whatever might be re-

quired by the provisions of law and the faithful discharge of the trust reposed in such depositary.

6. That thereupon the said defendant, The National Surety Company, by its duly authorized agent and attorney in fact in consideration of a certain reward to it paid by the said, The First National Bank of Harrison, and in further consideration of the deposits of money to be made by this plaintiff in the said depositary bank. The First National Bank of Harrison in reliance upon such bond did, with the said First National Bank of Harrison as principal, duly make, execute and deliver to the plaintiff its depositary bond or obligation in writing running to The People of the County of Sioux, in the state of Nebraska, as obligee, conditioned as required by law, and as above recited and set forth, of which the following is a true and correct copy to-wit:

National Surety Company

County Depositary Bond

(Nebraska)

Know all men by these presents:

That we, First National Bank of Harrison, Nebraska
As Principal, and the National Surety Co. of New York, N. Y., as Surety are held and firmly bound unto the
people of the County of Sioux in the State of Nebraska, in the just and full sum of Thirty Thousand
and no/100 ..... Dollars ($30,000.00), for the payment of which, well and truly to
be made, we hereby bind ourselves, our successors and assigns, jointly and severally by these presents.
Dated this 12th day of December A. D. 1922.

[fol. 19]

Whereas, the said bank in consideration of the deposits of certain of the moneys of Sioux County
..... for safe keeping with and in First National Bank, Harrison, Nebraska the amount whereof shall be subject to withdrawal or diminution by said
County Treasurer, as the requirements of said County

shall demand, and which amount may be increased or decreased as the said Treasurer may determine; and,
Whereas, the said Bank, in consideration of said deposit, and for the privilege of keeping the same, has agreed to pay and
will pay to Sioux County the sum of not less than
two per cent (2%) per annum on account of said deposit, the same shall be paid quarterly upon the daily average
of the sum of such amount as the said bank shall have on deposit, for the quarter or any fraction thereof next preceding the
payment of said percentum, which shall be computed and credited to the account of Sioux County
and shall become a part thereof.
Now, therefore, if the said First National Bank
of Harrison, Nebraska shall at the end of every month render to the Treasurer of said
Sioux County and County Board a statement
in duplicate showing the daily balance of the Sioux County
moneys held by it during the month next preceding, and the accretions thereof, and *has* the same has been credited, and shall
well and truly keep all of said sums of money so deposited, or to be deposited, as aforesaid, subject to the check and order of
County Treasurer, as aforesaid, and s-all pay over the same and each and every part
[fol. 20]
thereof, upon the written demand of the County Treasurer, and shall estimate, calculate and
pay said percentum as aforesaid, and to his successor in office as shall be by him demanded, and shall in all respects, save and
keep the County of Sioux and the said County
Treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be
void, otherwise to be and remain in full force and virtue.

This bond to be and remain in full force for a period of Four Years beginning on the 4th day of January 1923, and ending on the 6th day of January 1927

In Testimony Whereof, the said First National Bank of Harrison, Nebraska the Principal, herein named, has caused this instrument to be signed *by* its name and behalf by its President, or Vice-President, attested by its Cashier, and its Corporate [Seal] to be hereto affixed, and the said National Surety Co., of New York, N. Y., the Surety herein named, has caused this instrument to be signed in its name and behalf by its Attorney-in-fact And attested by its common and corporate seal hereto affixed the day and year above written.

First National Bank, Harrison, by W. H. Davis, Vice-Preident. Attested: Theo Okerblade, Cashier.
[fol. 21] First National Bank of Harrison, Corporate Seal, Harrison, Nebr. National Surety Co., by Frank Wheeler, Attorney-in-Fact. National Surety Company, Incorporated 1897, New York.

STATE OF NEBRASKA,
Sioux County, ss:

Filed in the office of County Clerk this 26th day of Dec. 1922.

A. C. Davis, County Clerk.
Book C of Bonds, page 277.

Approved as to form and sufficiency & ordered filed.
W. B. Woodruff, Chairman Board Co. Commrs.
Henry Thomas.

7. And that thereupon the said bond was duly filed with the County Board of Commissioners of said county, together with the said application for approval.

8. Thereupon to-wit: On said 26th day of December A. D. 1922 the Honorable Board of the County Commissioners of said County of Sioux did duly act upon the application of the said, The First National Bank of Harrison, and did

accept and approve the said application, and did select said First National Bank of Harrison as such depositary and did accept and approve the said depositary bond so filed in behalf of said depositary bank and did give notice of such acceptance and approval to the said defendant, the National Surety Company, and thereupon the said, The First National Bank of Harrison became and was, and so remained, until the insolvency of said bank, a depositary bank of county funds under the provisions of law in that behalf and that this plaintiff, as such county Treasurer, pursuant to [paw] retained on deposit, and from time to time did deposit, and at all times did keep on deposit for safe keeping therein moneys in his hands collected and held by him as such County Treasurer in reliance upon the said bond above copied and set forth with the knowledge of the said defendant National Surety Company.

9. That the said depositary bond covered one term only of this plaintiff as County Treasurer to-wit: The official term commencing on the 4th day of January A. D., 1923.

[fol. 22] 10. On the 4th day of February A. D. 1924 this plaintiff, as such County Treasurer, had kept on deposit for safe keeping in said depositary bank to-wit: The said The First National Bank of Harrison, under and in reliance upon the said bond, moneys in his hands so collected and held by him as such County Treasurer to and in the amount of $35,395.70, and that the same was so deposited and then remained so on deposit in said depositary bank in an open account as a general deposit subject to the check or draft of this plaintiff as such County Treasurer and subject to disposition as provided by law and the conditions of said bonds, and that on said date the said, The First National Bank of Harrison, became and was insolvent and because of such insolvency ceased to do business as such, and closed its doors and refused to pay checks and drafts lawfully drawn thereon by this plaintiff, and its depositors, and the Comptroller of the Currency becoming satisfied of the insolvency thereof, after a due examination of its affairs, having found the same to be insolvent, with the approval and consent of the Secretary of the Treasury of the United States, pursuant to the authority vested in him by law on the 12th day of February A. D.

1924 did appoint one Ralph S. Pryce as receiver of the said insolvent bank, The First National Bank of Harrison and that on the said 12th day of February A. D. 1924 the said Ralph S. Pryce, having duly qualified as such receiver, took possession of the said bank and all of the money, deposits, and assets thereof including the deposit of this plaintiff therein for the purpose of closing the affairs of the said bank, and for the other purposes provided by law and ever since has been, and is now, the receiver of the said, The First National Bank of Harrison, and in possession of all of its moneys, deposits, properties and assets, and that the deposit above alleged and referred to and herein involved then had and held by this plaintiff in the said depositary bank was a deposit covered by the depositary bond above alleged, copied and set forth.

11. That by reason of said insolvency and the appointment of such receiver the said The First National Bank of Harrison incapacitated itself to make payment and delivery of the said moneys of this plaintiff as such County Treasurer so on deposit with it under said bond, but nevertheless this plaintiff has, from time to time, duly demanded payment of said deposits in said sum of $35,395.70 from the said bank and from its said receiver and has likewise, from time to time, prior to the institution of this suit, de-
[fol. 23] manded the interest accruing under said deposit and secured by said bond, but payment thereof has been refused by the said bank and its said receiver for want of funds wherewith to pay and discharge the same and the same has been wholly converted to the use of the said. The First National Bank of Harrison, and no accounting has been made therefor to this plaintiff either by said bank or its said receiver.

12. The said bank paid interest under the terms of said deposit on the said deposit up to the first day of January A. D. 1924, and that there is due under and unpaid from the said bank upon said deposit, interest at 2% per annum from that date on account of said deposit payable quarterly upon the daily average of the sum of such account as the said bank had on deposit for the quarter or any fraction thereof next preceding the payment of said percentum, and that the amount of said interest so accruing upon daily balances from the first day of January A. D.

1924 to the date of the insolvency of said bank and the demand by this plaintiff of payment of his deposit and the refusal of the said bank to-wit: The 4th day of February 1924 in the sum of $— which should be tacked to the principal sum, together with interest on the total at 7% per annum from the said 4th day of February A. D. 1924.

13. Plaintiff brings this action in his official capacity as treasurer of said county of Sioux for the use and benefit of the people of the county.

14. That under the provisions of Article IV of title 5 of the Civil Administrative Code of the state of Nebraska Comp. Stats. Neb. 1922 Section 7811 and other sections, it is provided that in all cases where the beneficiary or other person entitled thereto brings an action at law upon any policy of guarantee, fidelity, liability, or other insurance of a similar nature against any company doing business in this state, the court, upon rendering judgment against such company, shall allow the plaintiff a reasonable sum as attorneys fees in addition to the amount of the recovery to be taxed as part of the costs and if such case is appealed the appellate court shall likewise allow a reasonable sum as attorneys fee for the appellate proceedings, and that under the provisions of the statute of the state of Nebraska the plaintiff is entitled to have allowed him such reasonable attorneys fee in addition to the amount of his recovery to be taxed as part of the cost herein.

[fol. 24] 15. That there is now justly due, owing and unpaid from the defendant National Surety Company under the terms of said bond in consideration of the premises the sum of $30,000.00 no part whereof has been paid, although payment has been often demanded.

Wherefore plaintiff prays judgment against said defendant in the sum of $30,000.00 its debt, together with 7% interest thereon from February 4, 1924, together with costs of action including a reasonable sum as the plaintiff's attorney fee in addition to the amount of such recovery to be taxed as part of the costs of this action.

M. J. O'Connell, E. D. & F. A. Crites, Attorneys for Plaintiff.

Duly sworn to by Edwin B. Lyon. Jurat omitted in printing.

In United States District Court

Answer to Amended Petition—Filed June 4, 1925

Defendant for answer to the amended petition of the plaintiff admits paragraph One, Two, three and four thereof.

2. The defendant for answer to paragraph six admits the signing execution and delivery of the written instrument set forth in paragraph six of plaintiff's amended petition and that said written instrument bears upon the face thereof the endorsements as to filing and approval.

[fol. 25] 3. For answer to paragraph seven of the amended petition admits that said bond was filed with the County Board of Commissioners of said County.

4. For answer to paragraph Ten of said amended petition admits that on the 4th day of January, 1924 there was on deposit in the First National Bank of Harrison a deposit in the name of Edwin B. Lyons, County Treasurer amounting to $35,395.07, that the First National Bank of Harrison became insolvent and ceased to do business and that one Ralph S. Pryce was appointed receiver of said Bank and that the said Pryce on the 12th day of February, A. D. 1924, having duly qualified as receiver took possession of said Bank and all the assets thereof, and that he is now the receiver of said Bank.

5. Defendant for further and additional answer to the said amended petition denies each and every allegation therein contained not hereinbefore specifically admitted.

6. Defendant for further and additional answer to the amended petition of plaintiff alleges and says; that at all times mentioned in the amended petition of the plaintiff the First National Bank of Harrison, Nebraska was a National Bank with an authorized capital of $50,000 and having in truth and in fact no paid up capital in excess of $50,000; that under and by virtue of the laws of the State of Nebraska

the Treasurer of Sioux County, Nebraska was forbidden to deposit in said Bank any sum or sums in excess of 50% of the paid up capital of said bank and at the time of the making and executing of said bond and the filing thereof with the County Clerk and any action thereon by the County Board of Sioux County, Nebraska it was well known and understood by all parties to said bond that the County Treasurer of Sioux County, Nebraska was limited in the deposits he made in the First National Bank of Harrison to 50% of the paid up capital thereof and that until the capital stock of said bank was increased the full amount of the penalty of said bond could not be deposited in said bank, and said bond was made, executed and delivered solely for the purpose of securing any deposits that the County Treasurer of Sioux County, Nebraska might make in said Bank as authorized by the laws of the State of Nebraska and accrued interest as in said bond provided and that said bond in truth and in fact did not and does not secure repayments of money deposited in excess of one half of the paid up capital stock of said bank to wit: $25,000 and [fol. 26] interest thereon at 2% per annum from the 1st day of January, 1924 to the 4th day of January, 1924.

7. This answering defendant further alleges and says: that the plaintiff herein realizing and acknowledging that the bond of the defendant was to secure repayment of deposits not in excess of 50% of the capital stock of said Bank did on the 10th day of January, 1923, as a condition to make or keep on deposit in said First National Bank of Harrison, Nebraska any sums in excess of 50% of the Capital stock of said First National Bank of Harrison, Nebraska, cause said First National Bank of Harrison, Nebraska to make and deliver unto the plaintiff herein individually a certain undertaking signed by six residents of Sioux County, Nebraska which said undertaking was in the penal sum of $10,000 conditioned to indemnify and keep the plaintiff herein individually harmless by reason of making said excess deposits in the First National Bank of Harrison, Nebraska and the deposits therein made in excess of 50% of the capital stock of said Bank were made in reliance of said undertaking last named and not in pursuance to or on reliance of the bond set forth in this petition.

Wherefore defendant having fully answered the prayer of plaintiff's petition prays that it may go hence without day and recover costs of suit herein expended.

Honnold & Clarke, Mothersead & York, Attorneys for Defendant.

Duly sworn to by R. C. Clarke. Jurat omitted in printing.

[fol. 27] In United States District Court

Motion to Strike Answer—Filed September 12, 1925

Comes now the plaintiff by E. D. & F. A. Crites his attorneys, and moves the court for an order striking out of the defendants answer herein, all of paragraph 6 thereof and all of paragraph 7 thereof, for all of the following reasons to-wit:

The matters and things sought to be pleaded, alleged and set forth are not material; that the same do not constitute or tend to constitute any defense herein; that the same is frivolous and the said defendant is estopped by its bond from alleging, pleading or proving the matters and things set forth in said paragraphs; that the obligee in said bond, the people of the county of Sioux, are not estopped by any of the alleged acts of the treasurer of said county claimed by the defendant to be illegal.

This motion is made separately as to each of said paragraphs.

E. D. & F. A. Crites, Attorneys for Plaintiff.

In United States District Court

Reply—Filed September 12, 1925

Comes now the plaintiff, Edwin B. Lyon as county treasurer for the county of Sioux in the state of Nebraska, and for reply to the answer of the defendant filed herein, denies generally each and every allegation of new manner therein contained.

1. That the people of the county of Sioux are not estopped by acts of misfeasance on the part of its officers, and that the said county did not contract with the defendant as surety on said bond to the effect that the said treasurer of said county should and would perform his public duties faithfully, or that he would not deposit in the said First National Bank of Harrison, public moneys in his possession as such treasurer in excess of the sum of $25,000.00; that the said defendant at all times well knew and understood such fact and by virtue and in consequence of the execution of said bond did consent to be bound by it, and that it became liable for public moneys deposited in said bank by said treasurer in the sum of $30,000.00 as provided by said bond; [fol. 28] that the said First National Bank of Harrison and the said defendant its surety, having, by means of said bond, secured possession of public funds of the people of the county of Sioux are estopped and barred from pleading or attempting to prove any want of liability to perform the condition of said bond, that is, to pay the penalty thereof, namely the sum of $30,000.00 upon the closing of the doors of said bank, it then having on deposit under such bond the said sum of $35,395.70; that the obligation of the defendant as surety as written in said bond is the sum of $30,000.00, and that premiums were paid to and received by the defendant on the basis of a liability and obligation of $30,000.00 and said defendant is now estopped and barred to plead or attempt to prove a less obligation or liability, it having admitted in its answer herein the amount of the deposit of such moneys as aforesaid, in excess of such sum; that the amount of defendants liability thereunder is not contingent in any way upon the neglect of the treasurer of said county, or the legality of his actions; that the said defendant is estopped and barred by all of said facts and the recitals in said bond from pleading and proving its alleged defense herein.

For further reply to said answer, plaintiff alleges that defendant is estopped and barred to plead or prove that the action of its principal in accepting a deposit from the treasurer of said county in excess of $25,000.00 is a bar to the right of the people of the county of Sioux to maintain an action and to recover herein the amount of the said Bond

to wit: The sum of $30,000.00 with interest from the date of closing of said bank.

Wherefore plaintiff prays judgment as he heretofore has done.

E. D. & F. A. Crites, Attorneys for Plaintiff.

Duly sworn to by Edwin D. Crites. Jurat omitted in printing.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRY—September 18, 1925

This cause coming on for hearing this 18th day of September, 1925 in open court, Plaintiff appearing by Messrs E. D. & F. A. Crites, his attorneys, and Defendant appearing by Messrs. Honnold & Clarke, and the hour of 4:30 P. M. having arrived and the conclusions of the Hon. Court not being yet given, it is

Ordered, that Court adjourn until Tuesday Sept. 18, 1925.

Attest:

R. C. Hoyt, Clerk, by L. J. F. Iaeger, Deputy Clerk.

[fol. 30] IN UNITED STATES DISTRICT COURT

STIPULATION WAIVING JURY—Filed September 14, 1925

It is hereby stipulated that a jury trial be waived and this cause may be tried to the Court.

M. J. O'Connell and E. D. & F. A. Crites, Attys. for Plff. Mothersead & York & R. C. Clarke, Attys. for Deft.

IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—Filed September 22, 1925

This cause, this 18th day of September A. D., 1925, the same being a regular day of said term came on to a trial in open court upon the pleading and the evidence, the plaintiff appearing by Messrs. E. D. & F. A. Crites, his attorneys, and the defendant by Messrs. Homold & Clarke and by Messrs. Mothersead & York, its attorneys, and is submitted to the court, a jury trial having been waived by stipulation in writing, duly made and filed prior to the trial, upon consideration whereof the court finds generally, in favor of the plaintiff and against the said defendant, finds that all of the facts stated and allegations in plaintiff's petition are true, that the said defendant is estopped and barred from pleading or proving the matters and things set forth in its answer herein, and that no defense has been proven on the part of the defendant to the plaintiff's cause of action, and that there is justly due and owing from the defendant to plaintiff under the depositary bond pleaded in the petition, the sum of $30,000.00, with [75] interest thereon from February 4, 1924, for which sum plaintiff is entitled to judgment against the defendant to of which findings the said defendant duly excepts; and the plaintiff having prayed for an order fixing and allowing a fee for its attorneys to be taxed as costs under the Nebraska statute, and the court not being fully advised in the premises, the cause is continued until next [*Teus*day] morning the 22nd day of September 1925 for judgment.

[fol. 31] And now on this 22nd day of September, 1925, the same being a regular day of said term, the parties appearing as before, and the court having maturely considered of the law and the premises, finds that the plaintiff is entitled, under the statute, to the taxation of a fee for his attorneys as costs herein, and upon the evidence of the [paries] this day submitted as to the amount to be allowed, further finds that the firm of E. D. & F. A. Crites, the plaintiff's attorneys, have had entire charge of and responsibility for the action in behalf of plaintiff and upon

consideration of the value of the services of said attorneys to the plaintiff, the amount of time and labor expended by them, that the sum of $3,000, is a reasonable allowance for a fee for said attorneys, and that such sum does not bear an unfair proportion to the amount of the judgment herein recovered, to which finding defendant duly excepts.

It is therefore considered and adjudged by the court here, that the plaintiff do have an recover of and from the defendant the sum of $33,492.50 together with its costs herein expended to be taxed and that this judgment bear interest at 7% per annum from this date until fully paid.

It is further ordered by the court that the sum of $3,000.00 be, and the same is hereby allowed to the plaintiff as a fee for said E. D. & F. A. Crites, his attorneys and that the clerk of this court do tax the same as costs, against the said defendant, in addition to said judgment, said sum to bear no interest, to which order the defendant excepts.

Same day said cause came on further to be heard on defendants motion to vacate and set aside findings and judgment, and to grant a new trial of the issues joined and is submitted to the court, the parties appearing as before upon consideration whereof the court finds that the same is not well taken, and doth over-rule and deny said motion, to which order the defendant excepts.

By the Court:

J. W. Woodrough, Judge.

[fol. 32] In United States District Court

Petition for Writ of Error—Filed November 18, 1925

To the Hon. J. W. Woodrough, Judge of the District Court aforesaid:

Now comes National Surety Company, a corporation by its attorney and respectfully shows that on the 22nd day of September, 1925 the Hon. District court of the United States for the District of Nebraska, Chadron Division, on trial of an action of law therein to said court wherein a jury had been waived in writing before the trial, made a finding and judgment against your petitioner in favor of

Edwin B. Lyon as the County Treasurer of the County of Sioux, defendant herein.

Your petitioner feeling itself aggrieved by the said finding and judgment entered thereon as aforesaid, herewith petitions the court for an order allowing it to prosecute a writ of error to the Circuit court of Appeals of the United States for the 8th Circuit court under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that a writ of error do issue, that an appeal in this behalf to the United States Court of appeals sitting at St. Louis in said circuit for the correction of the errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the circuit court of appeals.

Honnold & Clarke, Mothersead & York, Attorneys for National Surety Company.

In United States District Court

Order Allowing Writ of Error—Filed November 18, 1925

Now on this 2nd day of November, 1925 the petition of the defendant, National Surety Company for writ of Error herein came on to be heard, and the Court being fully advised inthe premises find that the prayer of said petition should be granted.

[fol. 33] It is therefore Ordered that writ of error herein is issued to Edwin B. Lyons as County Treasurer of Sioux County & Supersedeas bond is fixed in the sum of $40,000.00 such bond when approved to act as a supersedeas.

J. W. Woodrough, Judge of the District Court of the United States for the District of Nebraska.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed November 18, 1925

Now comes the National Surety Company, plaintiff in error in the above entitled cause and in connection with its petition for a writ of error in this cause assigns the following errors which plaintiff in error avers occurred at the trial thereof, and upon which it relies to reverse the judgment entered herein as appears of record.

1. The court erred in making and finding judgment for the plaintiff, the defendant in error herein and against the defendant, the plaintiff in error herein for any amount whatsoever in excess of Twenty five thousand dollars and interest thereon, the same being one half the amount of the paid up capital of the First National Bank of Harrison.

2. The court erred in finding and holding that the defendant, plaintiff in error herein on the bond executed in this action was liable for any amount of the funds of Sioux County, Nebraska, deposited in the First National Bank of Harrison, Nebraska in excess of Twenty five thousand Dollars, that being one half of the amount of the paid up capital of said bank.

3. The court erred in not determining and adjudging that the bond on which action is brought in this case and which the defendant, plaintiff in error in this case, executed secured deposits of the county funds of Sioux in the First National Bank of Harrison, should be read and construed in connection with the laws of the State of Nebraska governing the deposit of County funds in banks and prohibiting the deposit of county funds in any bank in excess of 50% of the paid up capital of said bank so that the liability of [fol. 34] this defendant under said bond would not be in excess of one half of the paid up capital stock of the First National Bank of Harrison, to wit: $25,000.00.

4. The judgment of the court was erroneous in this, that the same is excessive in the amount of $5,000 together with interest from the 4th day of February, 1924.

5. The court erred in allowing as part of the costs of said action attorney fees to the counsel for the plaintiff in the court below, defendant in error herein.

6. The court erred in holding and determining that the statutes of the state of Nebraska relative to costs in actions on surety bonds governed and controlled the Federal Courts.

7. The amount of attorney fees taxes for plaintiff as part of the costs of said action is excessive.

8. The court erred in overruling motion for new trial by the plaintiff in error in said action.

To all of the above matters at the time of the happening thereof the defendant, plaintiff in error herein duly excepted and said exceptions were duly allowed by the court.

Wherefore the defendant, National Surety Company, plaintiff in error herein prays that the judgment of the District court of the United states for the District of Nebraska, Chadron Division be reversed and judgment rendered in favor of the defendant, National Surety Company for costs.

Honnold & Clarke, Mothersead & York, Attys. for National Surety Company, Plff. in Error.

IN UNITED STATES DISTRICT COURT

[Title omitted]

WRIT OF ERROR AND CLERK'S RETURN—Filed November 18, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judge of the District Court of the United States for the District of Nebraska, Chadron Division, Greeting:

[fol. 35] Whereas, in the records and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you, at the September 1925 term thereof, between Edwin B. Lyon as County Treasurer of the County of Sioux, plaintiff and National Surety Company, defendant, a manifest error hath happened, to the great damage of the said National Surety Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the eighth circuit, on or before the — day of December, 1925, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Wm. H. Taft, Chief Justice of the United States this 2nd day of November, 1925 in the year of our Lord, One thousand nine hundred twenty five.

Issued at Chadron, Nebraska with the seal of the District Court of Nebraska and dated as aforesaid.

R. C. Hoyt, Clerk of the District Court of the United States for the District of Nebraska, by L. J. F. Iaeger, Deputy. (Seal U. S. Dist. Court, Chadron Div., Dist. of Nebr.)

Allowed by J. W. Woodrough, United States District Judge.

[fol. 36] Return to Writ of Error

United States of America,
District of Nebraska,
Chadron Division, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things [things] concerning the same.

In witness whereof, I hereto subscribe my name [my name] and affix the seal of said District Court, at my office

[on] the City of Chadron this 18th day of January, A. D. 1926.

R. C. Hoyt, Clerk, by L. J. F. Iaeger, Deputy. (Seal U. S. Dist. Court, Dist. of Nebr., Chadron Div.)

[File endorsement omitted.]

Citation, in usual form, showing service on Edwin D. Crites, filed November 23, 1925, omitted in printing.

[fol. 37] Bond on writ of error, approved and filed November 23, 1925, omitted in printing.

[fol. 38] In United States District Court

Bill of Exceptions—Filed December 17, 1925

Caption

Be it Remembered that on the 14th day of September, 1925, at the regular September, 1925, term of the District Court of the United States for the District of Nebraska, Chadron Division, Honorable J. W. Woodrough, Judge, presiding, the above entitled cause was called for trial, a jury waived in writing by the parties before the trial, and the trial commenced and continued and was concluded on said 14th day of September, 1925; E. D. Crites, Esq., and F. A. Crites, Esq., appearing for plaintiff and R. T. York, Esq., and R. C. Clark, Esq., appearing for defendant; at which trial the plaintiff introduced and offered in evidence the following stipulation which was made in open court in said cause in the words and figures following:

[fol. 39] [Title omitted]

Stipulation of Facts

Appearances: E. D. & F. A. Crites, Attorney- for Plaintiff; Honnold & Clarke and Mothershead & York, Attorneys for Defendant.

Be it Remembered:

That on the 14th day of September, A. D. 1925, that being one of the days of the stated September, A. D. 1925 sitting of the District court of the United States for the District of Nebraska, Chadron Division, held in said division in the city of Chadron in the County of Dawes therein, the above entitled cause came on for hearing for trial before the court, the Honorable J. W. Woodrough, District Judge, presiding; and that to maintain the issue joined the above named parties introduced in evidence the following stipulation which was made in open court in the above entitled cause in the words, letters and figures following, that is to say:

For the purposes of the trial of this cause it is hereby mutually stipulated, conceded and agreed by and between the parties thereto that the facts hereinafter recited are true; that said cause be heard, tried, submitted and decided by the court upon this stipulation, which shall be the evidence in the case, namely:

1. That the county of Sioux on all of the dates involved herein was and now is a body politic and corporate, duly authorized and existing as one of the counties of the state of Nebraska under the constitution and laws of said state.

2. That the plaintiff now is and on all other dates involved herein was the duly elected, qualified and acting county treasurer of said county of Sioux, and was so elected and qualified for the term of four years, commencing on the 4th day of January, 1923, and is now in possession of said office and the exercise of the rights, duties, and franchises thereof.

3. That the Defendant National Surety Company, on all said dates was and now is a corporation duly authorized, organized and existing as such under and by virtue of the [fol. 40] laws of New York, and duly licensed, admitted and let in to do a surety business in the State of Nebraska as alleged in the petition.

4. On all said dates the First National Bank of Harrison in the State of Nebraska was and now is a national banking corporation, duly authorized, organized and existing as such under the National Banking Act of the United States, with

its principal office and place of business at Harrison, in Sioux County, Nebraska, with a paid up capital stock of fifty thousand dollars; and until becoming insolvent as hereinafter stipulated, transacted a national banking business at Harrison in said county; and that Harrison is the county seat of the said county of Sioux.

5. That under and by virtue of the provisions of the statutes of the state of Nebraska and the laws thereof in that behalf, it is and was at all times the duty of the plaintiff as such County Treasurer to deposit and at all times to keep on deposit for safe keeping in state, national or private banks doing business in the county of Sioux and of approved and responsible standing the amount of moneys in his hands collected and held by him as such county treasurer, the statutes of Nebraska providing, however, "The amount so on deposit at any time with any such bank shall not in either case exceed fifty per cent out of the paid capital stock of such bank."

6. That pursuant to the provisions of statute in that behalf the said The First National Bank of Harrison on the 26th day of December, 1922, then being located in said county of Sioux, did apply in writing to the Board of County Commissioners of Sioux County, Nebraska, for the privilege of keeping such moneys upon deposit in said bank upon the following conditions: "All such deposits to be subject to payment when demanded by the County Treasurer on his check, and interest to be paid thereon, amounting to two per cent per annum upon the amount so deposited, as provided by law, and subject also to such regulations as are imposed by law," and for the security of the funds so deposited under the provisions of law, the County Commissioners did require the said The First National Bank of Harrison as such depositary to give bond for the safe keeping and payment of such deposits and the accretions thereof running to the people of the county, to be approved by the County Board, and conditioned that such depositary should at the end of each and every month render to the Treasurer and [fol. 41] County Board a statement in duplicate showing the several daily balances and the amounts of money of the county held by it during the month and the amount of the

accretion thereof, and how credited, and for the payment of the deposits and the accretions accrued thereon as provided by law, and for the payment of the deposits and the accretions thereon when demanded by the County Treasurer on his check at any time, and generally to do and perform whatever might be required by the provisions of law and the faithful discharge of the trust reposed in such depositary.

7. That thereupon the said defendant the National Surety Company, by its duly authorized agent and attorney in fact, in consideration of a certain premium and reward to it paid by the said the First National Bank of Harrison, and in further consideration of the deposits of money to be made by the plaintiff in said depositary bank. The First National Bank of Harrison in reliance upon such bond did, with the said The First National Bank of Harrison as principal, duly make, execute and deliver to the plaintiff its depositary bond or obligation in writing running to the people of the County of Sioux in the State of Nebraska as obligee, and conditioned as required by law, and that a true copy of said bond is set out in the Plaintiff's amended petition filed herein which copy is incorporated into this stipulation by reference as fully to all intents and purposes as though the original bond were produced and included in this stipulation; that said bond was duly approved by the Board of County Commissioners of said county of Sioux, both as to form and sufficiency, and ordered filed, and the same was on the 26th day of December, 1922, duly filed and entered of record in the records of said county of Sioux by the Clerk of said county, and said bond was thereupon delivered to the proper authorities of said county, who are yet in the possession thereof, and that the same is in full force and effect, and never has been cancelled; that the First National Bank of Harrison has paid the premium accruing under said bond, which premium money was accepted and retained by the defendant.

8. It is further stipulated and agreed between the parties that all of the allegations of paragraphs 8 and 9 of the amended petition are true and the facts therein contained are hereby made a part of this stipulation of fact as fully

to all intents and purposes as though written out at length herein.

[fol. 42] 9. On the 4th day of February, 1924, this plaintiff as such county Treasurer of the county of Sioux had and kept on deposit for safe keeping in said depositary bank, to-wit: the said The First National Bank of Harrison, moneys in his hands so collected and held by him as such County Treasurer to and in the amount of $35,395.70, and that the same was so deposited and then remained so on deposit in said depositary bank in an open account as a general deposit; subject to the check or draft of the plaintiff as such County Treasurer, and subject to disposition as provided by law, and the conditions of said bond; and that the said County Treasurer had deposited during the time intervening between the date of said bond and the date of the failure of said bank hereinafter referred to, a sum equal to $30,000.00 and more.

10. That on said 4th day of February, 1924, said The First National Bank of Harrison became and was insolvent, and because of such insolvency ceased to do business as such, and closed its doors and refused to pay checks and drafts lawfully drawn thereon by this Plaintiff and its other depositors; and the comptroller of the currency on the 12th day of February, 1924, having found said bank to be insolvent, did duly and legally appoint one Ralph S. Price as Receiver of said insolvent bank, and that said Price qualified and took possession of the said bank and all of the money, deposits, and assets thereof, including the deposit of the plaintiff therein on the 12th day of February, 1924, for the purpose of closing up the affairs of the bank, and for the purposes provided by law, and is now in possession of said assets.

11. No part of the said deposit of $35,395.70 of the said Treasurer at the time of the closing of said bank has ever been repaid the Plaintiff, nor has any interest thereon been paid to the Plaintiff, although demanded. That the least credit made by said bank of interest to said account was on the first day of January, 1924, which was in full to that date, and that the average daily deposits during the period of time intervening between the first day of January, 1924, and the closing of the doors of said bank, namely, February

4, 1924, is $28,793.10, and that no interest was credited to said account on the average daily deposits subsequent to January 1st, 1924.

12. That plaintiff has demanded payment of the amount of said bond, together with interest from the date of the closing of the bank of the Defendant National Surety Company, but same has been entirely refused. The defendant, [fol. 43] however, at all times has been ready, able and willing to pay their admitted liability of $25,000.00 under said bond, which plaintiff has at all times refused to accept; but no actual tender of any amount has ever been made.

13. That on the 10th day of January, 1923, the said The First National Bank of Harrison, Nebraska, as principal, and six parties whose names appear thereon, executed and delivered to the County Treasurer of Sioux county, Nebraska, the Plaintiff herein, a certain depositary bond to secure the sum of $10,000.00, a true copy of which said bond is hereto attached and marked Exhibit "A" and made a part of this stipulation. That said bond was duly filed in the office of the County Clerk of Sioux county, Nebraska, on or about the day of its date, but never was presented to or acted upon by the Board of County Commissioners of said county of Sioux.

14. A true copy of said depository bond sued on herein is hereto attached marked "B" and made part hereof.

I hereby certify that the above and foregoing is a true and complete transcript of said stipulation and all of the testimony offered or given by either of the parties hereto upon the trial of this cause, as shown by my shorthand notes taken upon the trial of the cause.

Beatrice Yanders, Shorthand Reporter, who reported said cause.

EXHIBIT "A" TO STIPULATION

Excess Bond

Know all men by these presents:

That the First National Bank of Harrison, Nebraska, as Principal, and W. F. Shepherd, Con Parsons, W. L.

Hoyt, W. H. Davis, Theo. Okerblade, and A. L. Schurr, as sureties are held and firmly bound unto E. B. Lyons, in the penal sum of Ten Thousand and no/100 dollars lawful moneys of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that Whereas, the above bounden First National Bank of Harrison, Nebraska, has become a depository for funds belonging to [fol. 44] to said E. B. Lyon or deposited by him in said First National Bank of Harrison, Nebraska, and Whereas said Bank in consideration of said deposit and for the privilege of keeping the same, has agreed to pay and will pay to E. B. Lyon, the sum of not less than two per cent per annum on account of said deposit, the same shall be paid upon the daily average balance of the sum of such amount as the bank shall have on deposit,

Therefore if the said bank shall well and truly keep said sums so deposited subject to the check or order of said E. B. Lyon, upon written demand and shall keep the said E. B. Lyon harmless and indemnified for and by reason of making said deposits, and if the said First National Bank of Harrison, Nebraska, shall well and truly do and perform the aforesaid condition and undertaking in each and every respect, and all the duties arising therefrom on their part to be kept and performed, then and [then] in such case this bond shall be null and void; otherwise to be and remain in full force and effect.

Witness our hands this 10th day of January, 1923.
Attest:

First National Bank, Harrison, Nebr., by A. L. Schnurr, President. W. F. Shepherd, Con Parsons, W. L. Hoyt, W. H. Davis, Theo Okerblade, A. L. Schnurr.

Attest: Theo. Okerblade, Cashier.
In presence of Laura H. Unitt.
Exhibit "A."

EXHIBIT "B" TO STIPULATION

National Surety Company

County Depository Bond

(Nebraska)

Know all men by these presents:

That we, First National Bank of Harrison, Nebraska As Principal and the National Surety Co. of New York, N. Y. as surety are held and firmly bound [fol. 45] unto the People of the County of Sioux in the state of Nebraska, in the just and full sum of Thirty Thousand and no/100 ..... Dollars ($30,000.00), for the payment of which, well and truly to be made, we hereby bind ourselves, our successors and assigns, jointly and severally by these presents.

Dated this 12th day of December A. D. 1922.

Whereas, the said bank in consideration of the deposits of certain of the moneys of Sioux County for safe keeping with and in First National Bank, Harrison, Nebraska the amount whereof shall be subject to withdrawal or diminution by said County Treasurer, as the requirements of said County Shall demand, and which amount may be increased or decreased as the said Treasurer may determine; and,

Whereas, the said Bank, in consideration of said deposit, and for the privilege of keeping the same, has agreed to pay and Will pay to Sioux County the sum of not less than Two per cent (2%) per annum on account of said deposit, the same shall be paid quarterly upon the daily average Of the sum of such amount as the said bank shall have on deposit for the quarter or any fraction thereof next preceding the payment of said percentum, which shall be computed and credited to the account of Sioux County

And shall become a part thereof.
Now therefore, if the said First National Bank of Harrison, Nebraska shall at the end of every month render to the Treasurer of said Sioux County and County Board a statement In duplicate showing the daily balance of the Sioux [fol. 46] County moneys held by it during the month next preceding, and the accretions thereof, and how the same has been credited, and shall well and truly keep all said sums of money so deposited, or to be deposited, as aforesaid, subject to the check and order of County Treasurer, as aforesaid, and shall pay over the same and each and every part thereof, upon the written demand of the County Treasurer, and shall estimate, calculate and pay said percentum as aforesaid, and to his successor in office as shall be by him demanded, and shall in all respects, save and keep the County of Sioux and the said County Treasurer harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void; otherwise to be and remain in full force for a period of four years beginning on the 4th day of January 1923, and ending on the 6th day of January 1927.

In Testimony Whereof, the said First National Bank of Harrison, Nebraska, the principal, herein named, has caused this instrument to be signed in its name and behalf by its President, or Vice-President, attested by its Cashier, and its Corporate Seal to be hereto affixed, and the said National Surety Co., of New York, N. Y., the Surety herein named has caused this instrument to be signed in its name and behalf by its Attorney-in-fact

38 and attested by its common and corporate seal hereto affixed the day and year last above written.

First National Bank, Harrison, by W. H. Davis, Vice-President. Attested: Theo Okerblade, Cashier. (Corporate Seal First National Bank of Harrison, Harrison, Nebr.) National Surety Co., by Frank Wheeler, Attorney-in-fact. Na-
[fol. 47] tional Surety Company, New York. Incorporated 1897.

State of Nebraska,
Sioux County:

Filed in the office of the County Clerk this 26th day of Dec. 1922.

A. C. Davis, County Clerk.

Book C of Bonds, page 277.

Approved as to form and sufficiency & order filed.
W. B. Woodruff, Chairman Board Co. Commrs.
Henry Thomas.

Stipulation Approving Bill of Exceptions

It is hereby stipulated and agreed by and between Edwin B. Lyon as County Treasurer of the County of Sioux, plaintiff herein, and National Surety Company, Defendant herein, that the foregoing bill of exceptions contains all of the evidence given or offered on the trial of the case of Edwin B. Lyon as county Treasurer of the County of Sioux, Plaintiff, vs. National Surety Company, defendant, tried in the District Court of the United States for the District of Nebraska, Chadron Division, at the September term, A. D. 1925, thereof, and correctly shows the proceedings had on said trial; that said bill of exceptions is correct in all respects; that the same may be signed, settled and allowed, and made a part of the record in said cause by the Honorable W. W. Woodrough, the Judge who presided at the trial of said cause, without further notice to plaintiff or his counsel.

Honnold & Clark, Mothersead & York, Attorneys for Plaintiff. Edwin D. Crites, Attorneys for Plaintiff.

[fol. 48] (Prayer of Defendant for Approval of Bill of Exceptions)

Now, in furtherance of Justice, and that right may be done, the defendant presents the foregoing as its bill of exceptions in this case, and prays that the same may be settled and allowed, signed and certified by the court, and made a part of the record in this cause as provided by law.

Honnold & Clark, Mothersead & York, Attorneys for Defendant.

In United States District Court

Order Settling Bill of Exceptions

The foregoing bill of exceptions contains all of the evidence given or offered on the trial of the cause of Edwin B. Lyons as County Treasurer of the County of Sioux, Plaintiff, vs. National Surety Company, defendant, and correctly shows the proceedings had on said trial, and said bill of exceptions is correct in all respects, and is hereby approved, allowed and settled and made a part of the record herein.

Dated at Omaha, Nebraska, this 14th day of December, 1925.

J. W. Woodrough, Judge who presided at said trial.

In United States District Court

Motion for New Trial—Filed October 1, 1925

Comes now the Defendant, the National Surety Company, and moves the Court to set aside and vacate the judgment in the above entitled action, and to grant a new trial thereof, for the following reasons:

1. The judgment is contrary to law.
2. The judgment is contrary to the evidence.
3. The judgment is not supported by the evidence.

4. The Court erred in allowing attorney's fees to the plaintiff to be taxed as costs against the defendant.

5. The sum allowed as attorney's fees is excessive.

6. The Court erred in assessing the amount of recovery.

National Surety Company, Defendant, by Honnold & Clark and Motherstead & York, Its Attorneys.

[fol. 49] In United States District Court

Order Overruling Motion for New Trial

"Same day said cause came on further to be heard on defendant's motion to vacate and set aside findings and judgment, and to grant a new trial of the issues joined, and is submitted to the Court, the parties appearing as before, upon consideration whereof the Court finds that the same is not well taken, and doth overrule and deny said motion, to which order the defendant excepts.

By the Court:

J. W. Woodrough, Judge.

Filed Sept. 22nd, 1925."

In United States District Court

Præcipe for Transcript of Record—Filed December 14, 1925

To the Clerk of said Court:

You will please make a return to the writ of error issued herein by transmitting to the United States Circuit Court of Appeals within and for the Eighth Circuit at the City of St. Louis Missouri, under your hand and seal of said court, a true copy of the record herein, including the transcript of the proceedings in the District Court of Sioux County, Nebraska, the amended petition, the answer, the motion to strike out answer, the reply, the trial proceedings, the waiver of jury, the findings and judgment, petition for writ

of error, assignment of errors, order allowing writ of error, writ of error, citation and return of service thereon, the bond, the bill of exceptions, the motion fo- a new trial and ruling thereon, this præcipe, and the Clerk's certificate, and all other proceedings in the case.

National Surety Company, by Honnold & Clarke, Mothersead & York, Its Attorneys.

Service of this præcipe hereby accepted this 7th day of December, 1925.

Edwin D. Crites, Attorney for Defendant in Error.

[fol. 50] In United States District Court

Order Extending Time to File Transcript—Filed December 17, 1925

On this 14th day of December 1925, it is ordered that the clerk of said court have until the first day of February 1926 in which to complete and transmit the record in the above cause in the Circuit Court of Appeal Eighth Circuit.

Clerk enter this order.

J. W. Woodrough, Judge.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] Appearances of counsel omitted in printing.

[fol. 52] United States Circuit Court of Appeals, Eighth Circuit

Motion for Allowance and Taxation of Attorney's Fees for Defendant in Error on Appeal—Filed September 15, 1926

Comes now the Defendant in Error, the County of Sioux, and moves the court for an order allowing the Defendant

in error a reasonable sum as Attorney's fees for the appellate proceedings to be taxed as part of the costs of the appeal in compliance with the requirements of Section #7811, Comp. Stats. Nebr. 1922.

E. D. & F. A. Crites, Attorneys for Defendant in Error.

Affidavit

STATE OF NEBRASKA,
County of Dawes, ss:

Edwin D. Crites, being duly sworn on oath deposes and says, that he is one of the Attorneys for the Defendant in error in the above entitled cause and makes this affidavit on said Defendant's behalf.

That he is one of the firm comprised of Edwin D. Crites and Frederick A. Crites, copartners, under the Firm name of E. D. and F. A. Crites.

[fol. 53] That this affiant has personally had entire charge of this litigation from the time of its inception to the date of making this affidavit and intends to argue the same before the Court at Denver in the State of Colorado where same is to be submitted.

That both members of said Firm are duly admitted. licensed and practising attorneys of the Supreme Court of the State of Nebraska, and interior State Courts, and of the Circuit and District Courts of the United States for the District of Nebraska and of the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

And that affiant was admitted in the State Supreme Court, in the Circuit and District Courts of the United States in the year 1908, and shortly thereafter in the said United States Circuit Court of Appeals for the Eighth Circuit.

And that recovery had in the Court below amounts to the sum of $33,492.50, and that the said judgment has not been paid nor any part thereof nor has payment thereof been rendered, nor has any sum been paid into court and,

That the defendant in Error has had to follow this appeal for the recovery of the entire judgment.

This affiant as such attorney has had charge of all the preliminaries as to docketing the said appeal; that he examined the transcript and bill of exceptions, and that there-

after in due time affiant examined the printed records filed on the appeal on behalf of the plaintiff in error, authorities cited therein, and prepared, printed and filed the brief of the defendant in error comprising twenty-two printed pages.

That the residence of the affiant is about 400 miles from Denver where the cause is to be submitted and that the greater part of three days' and two nights' time will be [fol. 54] necessarily consumed in proceeding from affiant's home to the City of Denver, there arguing the case and returning therefrom.

That Affiant has been established in the City of Chadron for eighteen years, there has a reasonably good practice, commands as good fees as any paid in Northwest Nebraska and numbers among his clients substantial persons and corporations, among whom are the Chicago Burlington & Quincy Railway Company, the Chicago Northwestern Railway Company, The International Harvester Company of America, the United States Fidelity and Guaranty Company, The Southern Surety Company, the State Guarantee Fund Commission of the State of Nebraska, the United States National Bank of Omaha, for all of whom Affiant transacts local business and as well the largest bank in the City of Chadron, Nebraska, and two neighboring towns, from who he commands reasonably good fees.

That the plaintiff is entitled to have a fee taxed in this court on the appeal, for his attorneys, in such sum as shall be reasonable under the provisions of the Nebraska statute cited in the motion.

Edwin D. Crites.

Subscribed in my presence and sworn to before me this 11th day of September, 1926. Frederick A. Crites, Justice of the Peace. (Notarial Seal.)

[File endorsement omitted.]

[fol. 55] Minute entry of argument and submission September 15, 1926, omitted in printing.

[fol. 56] In United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1926

No. 7314

National Surety Company, a Corporation, Plaintiff in Error,

vs.

Edwin B. Lyons, County Treasurer, etc., Defendant in Error

In Error to the District Court of the United States for the District of Nebraska

Mr. Rush C. Clarke and Mr. James G. Mothersead (Mr. R. T. York, and Mr. A. R. Honnold, were with them on the brief), for plaintiff in error.

Mr. E. D. Crites (Mr. F. A. Crites was with him on the brief), for defendant in error.

Before Lewis, Circuit Judge, and Munger and Faris, District Judges

Opinion—Filed December 20, 1926

Lewis, Circuit Judge, delivered the opinion of the court.

The First National Bank of Harrison, Nebraska, was appointed depository of funds belonging to Sioux County in that State; and as the State statute required, gave a bond with appellant as its surety, conditioned that the bank would keep all sums of money deposited with it by the treasurer of the county subject to his order and would pay the same over upon the written demand of said treasurer. The bond recited that the deposits should be subject to withdrawal by the county treasurer as the requirements of the county [fol. 57] might demand, and that the amount on deposit might be increased or decreased from time to time as the treasurer might determine. The depository became insolvent at a time when there was on deposit with it funds to the amount of $35,395.70, and the county treasurer thereupon brought this action on the bond against the surety and

asked judgment for damages in the full penal sum named in the bond ($30,000) and for a reasonable sum for plaintiff's counsel as attorney fees to be taxed as a part of the costs.

The answer alleged that the First National Bank of Harrison had an authorized capital of $50,000, that under the State statute the county treasurer was forbidden to make deposits in said bank in excess of fifty per cent of the paid up capital of the bank, that the statute made it criminal for him to exceed that limit and that appellant as surety was not liable in excess of that amount, to-wit: $25,000.

A jury was waived and the case submitted to the court on an agreed statement of facts, which were substantially as they were stated in the pleadings. The court gave judgment for plaintiff in the sum of $30,000, the full amount named in the bond, found that $3,000 was a reasonable allowance as a fee for plaintiff's attorney in the cause and taxed that sum as a part of the costs against the defendant. To this action of the court objections were made and exceptions properly saved. The case was then brought here on writ of error, and counsel presents two questions, each one of law, as claimed error:

(1) Whether the surety was liable on the depository bond in excess of fifty per cent of the paid-up capital stock of the bank—$25,000.

(2) Whether the plaintiff in the case (defendant in error here) was entitled to have an attorney's fee taxed as a part of the costs under the provisions of the Nebraska statute.

The first question is based on that part of Section 6193 Comp. Stat. Neb. 1922, which reads:

"The treasurer shall not have on deposit in any bank at any time more than the maximum amount of the bond given by said bank in cases where the bank gives a guaranty bond, nor in any bank giving a personal bond more than one-half [fol. 58] of the amount of the bond of such bank, and the amount so on deposit at any time with any such bank shall not in either case exceed fifty per cent of the paid up capital stock of such bank."

The statute makes three limitations on the maximum of deposits, the third being cumulative of the other two; and

they seem to be of equal importance. The statute also (sec. 6195) makes it a misdemeanor for the county treasurer to fail or refuse to do or perform any duty required of him by the statute. In view of the statute it is contended that the obligation of the surety on the bond was limited to $25,000, inasmuch as it was prohibited and made unlawful for the treasurer to have on deposit with the bank at any one time more than that sum; and it is claimed that the supreme court of the State has so construed the statute. If that be so we will, of course, follow the interpretation of the statute given to it by that court. It can hardly be said that the exact issue made in this case on the third limitation has been presented to that court, but it has considered this statute, the duties of the county treasurer under it and the obligation of a surety of the depository bank in several cases, and expressed its views on the purpose and effect of these limitations. In Cole v. Myers, — Neb. —, 160 N. W. 894, the controversy was between two sureties, one for the depository bank and one for the county treasurer on his official bond, who had made an over-deposit, the total being $13,189.61. The bank's bond was in the penal sum of $10,000. It failed and the surety on that bond promptly paid to the county $10,000 as the amount of its liability, and to that extent procured an assignment of the deposit. Later the surety on the county treasurer's official bond paid the county the balance of the deposit, $3,189.61, took an assignment of that claim and also obtained assignment of the claim for the whole $13,189.61, which the county treasurer had filed with the receiver of the bank. In considering the respective rights of the two sureties to share in a dividend paid by the receiver on the whole amount of the deposit the court, in referring to the rights of the surety on the depository bank's bond said, after quoting the statute:

"The statute is by construction a part of the depository bond. Blaco v. State, 58 Neb. 557, 78 N. W. 1056. In entering into the contract of suretyship the surety had a right to assume that the treasurer would comply with the statute and limit his deposit to $10,000. The bond was given to [fol. 59] protect legal deposits of county funds to the contractual and statutory maximum of $10,000 and not as security for an illegal deposit in excess of that sum."

The court further said in that case that the surety on the depository bond was not in any wise responsible for the wrongful act on the part of the county treasurer in making the excess deposit; and that the over-deposits were made in violation of law. That opinion was rendered in 1916. It will be noted that the court in that case said that the statute here relied upon is a part of the depository bond. We take that to be an announcement of the general principle that the law of the place where a contract is made becomes a part of the contract. That is, the contract is to be construed and its obligations determined according to the law of the place. 2 Williston on Contracts, sec. 516; Ogden v. Saunders, 12 Wheat. 212; Railroad Companies v. Schutte, 103 U. S. 118, 140; Tennessee Bond Cases, 114 U. S. 663, 688.

In Re State Treasurer's Settlement, — Neb. —, 70 N. W. 532, the controversy was between the outgoing and incoming State treasurers. The former had made deposits in some of the depository banks in excess of the statutory limitation, and the latter, among other contentions, seems to have insisted that in the settlement between them the full amount of those deposits should be delivered to him in currency. He doubted whether the surety could be held at all for any amount in such instances. In considering the extent of liability of such depositories and their sureties on the bonds which they had given the court said:

"The depository law has fixed the maximum sum which the treasurer shall have on deposit in any bank at the same time at one-half of the amount of the bond executed by the bank. This is a limitation, not only upon the power of the treasurer to deposit, but restricts the bank from demanding a larger sum than one-half of the penal sum named in the bond. Were it not for this limitation, unquestionably a depository bank and the sureties upon its bond would be liable (on the bond) in case of a breach of its conditions, to the extent of the full penalty written in the bond. If the treasurer exceeds his duty by depositing a larger sum in a depository bank than he is authorized by law to do, it does not affect the liability of such bank and the sureties on its bond to repay to the State the sum deposited therein, in

strict conformity to the requirements of the depository law, and the accretions thereof."

[fol. 60] In State ex rel. v. People's State Bank of Anselmo, — Neb. —, 196 N. W. 912, it appeared that the county treasurer of Custer County had on deposit with the depository bank $44,000. Its capital stock was $15,000 and it became insolvent. The State had by statute provided for the creation of a guaranty fund from which depositors in failed State banks should be paid the amount of their claims, and the question was whether that fund was liable for payment of the amount deposited in the bank by the county treasurer in excess of fifty per cent. of the capital stock of the bank. The Act providing for that fund was held to have repealed the requirement of the statute with which we are now dealing, insofar as it exacted bonds from State banks as depositories. The attorney general conceded that the guaranty fund was liable for $7,500 of the $44,000 deposit, being fifty per cent. of the capital stock of the bank. He contended, apparently, that the guaranty fund stood in the place of the surety of the State bank under the prior law, and that $36,500 of the deposit having been made in the bank by the treasurer unlawfully, the guaranty fund could not be held for it. The trial court allowed the full amount of the deposit, to be paid out of the guaranty fund by the receiver. This action was reversed. The supreme court said:

"We are of the view that the provisions of section 6193, limiting the amount which a county treasurer may legally deposit in a bank to 50 per cent. of its paid-up capital stock, is still obligatory on the treasurer. This limitation was made for, and serves, a good purpose. If, then, the limitation is still effective, it follows as a matter of course that the deposits made by the treasurer in the bank in excess of $7,500 were in violation of the express terms of the statute. The question then arises whether the guaranty fund is liable for the payment of the excess. The liability of the guaranty fund is somewhat analogous to the liability of a surety or guarantor":

and it was held that

"The treasurer having deposited the county funds in the bank in violation of precise terms of the law the excess so

deposited is not entitled to the protection afforded to depositors by the guaranty law."

There was a dissent by three of the seven Justices. A rehearing was granted and the opinion which we have just considered was vacated and the judgment below affirmed. But the second opinion, found in 198 N. W. 1018, is based [fol. 61] entirely on the court's construction of the guaranty fund statute. That statute contained this:

"No bank which has complied in full with all of the provisions of this article shall be required to give any further security or bond for the purpose of becoming a depository for any public funds, but depository funds shall be secured in the same manner that private funds are secured."

The court said that the guaranty fund statute did not put a limitation on the amount that might be deposited by a county treasurer in a depository State bank, that there was no limitation on the amount of private funds that might be so deposited and that the Act disclosed a purpose to put the two on the same basis of protection. Nothing is said in the last opinion as to the extent of liability of a surety of a National bank depository under section 6193, to which situation the guaranty fund statute does not apply. Three of the Justices dissented, for the reasons stated in the first opinion; and those reasons and the conclusions therefrom were not rejected as unsound by the other Justices, if the premises on which they were based had been conceded to be tenable; that is, the guaranty fund as to such over-deposits was to be regarded as standing instead of a guaranty bond, under section 6193. From these decisions we think the unavoible conclusion is, that a surety is not liable for over-deposits made by a county treasurer in excess of any of the limitations fixed in section 6193. The bank is, of course, liable. It accepted the deposits and cannot be heard to say that they were made unlawfully. But the surety was not a party to those transactions. There is no evidence that it even knew of them. Neither the county treasurer nor the bank was its agent in those transactions.

The position taken by the supreme court of Nebraska in the cases that have been referred to is reasonable, just and based on sound principle. The Iowa supreme court, in

Fremont County v. Fremont County Bank, — Ia. —, 115 N. W. 925, and the Montana supreme court, in Yellowstone County v. First Trust & Savings Bank, — Mont. —, 128 Pac. 596, have expressed in substance the same views and conclusions. But on this question it is enough for us to know that the supreme court of the State has held that the limitation on deposits in section 6193 is to be read into the innocent surety's obligation.

[fol. 62] The contention on the second point is that the Nebraska statute classifies the fee to be allowed to plaintiff's counsel as costs, and directs that it be taxed as costs against the defendant; and that the supreme court of Nebraska, in construing this statute, holds that this fee is a part of the costs in the case, and not a part of defendant's contractual liability as such; and that the Federal statute makes provision for allowance of attorney- fees in civil cases, to be taxed as costs, and that Congress having legislated on the subject, the Federal court must apply the Federal statute to the exclusion of the State statute on the same subject. Taking up first the State statute, Comp. Stat. Neb. 1922, sec. 7811, it reads as follows:

"In all cases where the beneficiary, or other person entitled thereto, brings an action at law upon any policy of life, accident, liability, sickness, guaranty, fidelity or other insurance of a similar nature, or upon any certificate issued by a fraternal beneficiary association, against any company, person or association doing business in this state, the court, upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs, and if such cause is appealed the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings."

This statute was considered by the State supreme court in Nye-Schneider-Fowler Co. v. Bridges-Hoye & Co., — Neb. —, 151 N. W. 942, and (on rehearing) — Neb. —, 155 N. W. 235. In that case the surety on a contractor's indemnity bond was sued on the bond on account of the principal's default, along with the principal. The trial court refused to allow to plaintiff an attorney's fee to be taxed as costs.

The statute under consideration was passed after the contract and bond were entered into, and the surety contended that because of that fact compensation to plaintiff's counsel as attorney's fee in the case could not be taxed against the surety. The supreme court in it first opinion acceded to this contention and affirmed the ruling of the trial court. On reargument it reached a contrary conclusion, reversed the action of the trial court and directed that a reasonable allowance be made as a fee to the plaintiff's attorney and that it be taxed as part of the costs. It held that the statute applied to contracts and obligations entered into prior to the passage of the statute as well as to those made thereafter. The court in reaching its final conclusion adhered [fol. 63] strictly to the terms of the statute which made the attorney's fee a part of the costs in the case, to be taxed as such, and said that this related only to the remedy and did not create and add to the contractual liability of the defendant nor in any way change the contract or the liability thereon. This ruling was followed in Ward v. Bankers' Life Ins. Co., — Neb. —, 157 N. W. 1017, and in Reed v. American Bonding Co., — Neb. —, 166 N. W. 196. In the Reed case it appeared that the contract of insurance sued on was made before the statute was enacted, and it was insisted by defendant that to apply the statute in such a case would result in an impairment of the obligation of the contract. The court said the point had been fully considered in prior cases and that

"The decisions in these cases are based upon the proposition that the statute affects the remedy only, and to change the taxation of costs, even if it results in increasing the amount of costs, does not change the liability provided for in the contract, but only affects the method of enforcing that liability. If the contract is complied with, no costs are taxed against the company. If litigation becomes necessary to determine the liability, the costs result from the litigation, and not from any construction of the contract."

This, then, is not a statute affecting the contractual rights and liability of defendant, but one on the subject of costs only.

We turn to the Federal statute on the same subject. R. S. Secs. 823, 824 (U. S. Comp. Stat. Secs. 1375, 1378.) The first of these sections provides:

"The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States. * * * But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties."

The second section fixes the amounts to be respectively taxed. As to fees of attorneys:

"In cases at law, when judgment is rendered without a jury, ten dollars."

[fol. 64] This statute was originally enacted February 26, 1853 (10 Stat. 161), and the two sections, as we now have them in the revision, were included in one section.

It is the general rule that where Congress has not regulated the subject of costs, the Federal courts will follow the State statutes on the subject and award to the parties the costs to which they would be entitled if the litigation were in the State court where the Federal court is sitting. Seatcherd v. Love, 166 Fed. 53; Shreve v. Cheesman, 69 Fed. 785. This rule is in recognition of the provisions of R. S. Sec. 721 (U. S. Comp. Stat. Sec. 1538), which reads:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In The Baltimore, 8 Wall. 377, it was held that under the Act of February 26, 1853, attorneys, solicitors, and proctors might charge their clients reasonably for their services in addition to the taxable costs, "but nothing can be taxed as cost- against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated." In United States v. Sanborn, 135 U. S. 271, 282, the court said:

"The whole subject of fees in the courts of the United States is regulated by chapter 16, title 'Judiciary' of the

Revised Statutes. By section 823 it is provided that the fees allowed in that chapter and no other 'compensation' shall be taxed and allowed in the courts of the United States, to the officers therein named and to witnesses, except in cases otherwise expressly provided by law; leaving attorneys, solicitors, and proctors to charge and receive from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or as may be agreed upon between the two parties."

In Ex parte Peterson, 253 U. S. 300, the right to tax allowances for the services of an auditor appointed in a law case was under consideration. The court said that the Act of February 26, 1853, did not deal expressly or by implication with the subject of taxing as costs expenses of an auditor, and inasmuch as there was no Federal statute regulating the subject, the rule and practice prevailing in the [fol. 65] State court might be followed. See also Day v. Woodworth, 13 How. 362; In re Paschal, 10 Wall. 483; Flanders v. Tweed, 15 Wall. 450; Trustees v. Greenough, 105 U. S. 527; United States v. Waters, 133 U. S. 208, 212; Michigan Aluminum Foundry Co. v. Aluminum Co. of America, 190 Fed. 903.

Counsel for defendant in error relies upon Williamson v. Liverpool & London & Globe Ins. Co., 141 Fed. 54, and Spring Garden Ins. Co. v. Amusement Syndicate Co., 178 Fed. 519, in each of which the plaintiff below was permitted to recover an allowance as an attorney's fee against the defendant. In the Williamson case the State statute did not allow the recovery, so far as the opinion discloses, as a part of the costs to be taxed in the case, but it provided that such a fee might be recovered in event the insurer vexatiously refused to pay in accordance with its obligations. This is compensatory damages. In the Spring Garden Insurance Company case the Kansas statute did provide that the attorney's fee was to be recovered as a part of the costs. But that was a suit in equity, and sections 823 and 824 were not controlling.

For the reasons stated we think both points were well taken and the court erred in law in not sustaining them.

The judgment was excessive and attorney's fees cannot be taxed against defendant. Reversed with direction to set aside the judgment and vacate the order taxing plaintiff's attorney's fees against defendant as a part of the costs and that the court proceed to dispose of the case in accordance with the views herein expressed.

[fol. 66] In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted]

Judgment—December 20, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the National Surety Company, a corporation, have and recover against Edwin B. Lyon, County Treasurer of the County of Sioux, the sum of One Hundred Thirty-one and no/100 Dollars, for its costs in this behalf expended, to be collected according to law.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to set aside the judgment and vacate the order taxing plaintiff's attorney's fees against defendant as a part of the costs and to proceed to dispose of the case in accordance with the views expressed in the opinion of this Court.

December 20, 1926.

[fol. 67] In United States Circuit Court of Appeals, Eighth Circuit

Clerk's Certificate

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that

the foregoing contains the transcript of the record from the District Court of the United States for the District of Nebraska as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the National Surety Company, a Corporation, was Plaintiff in Error and Edwin B. Lyons, County Treasurer of the County of Sioux, was Defendant in Error, No. 7314, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-fourth day of February, A. D. 1927, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the District of Nebraska.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at — office in the City of St. Louis, Missouri, this seventh day of March, A. D. 1927.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (Seal United States Circuit Court of Appeals, Eighth Circuit.)

[fol. 68] Supreme Court of the United States

Order Allowing Certiorari—Filed April 25, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.